U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

(202) 693-7300
(202) 693-7325 (FAX)
www.oalj.dol.gov

Date Issued: **July 12, 2000**

Case No.: **2000-INA-42**
CO No.: **P1996-CA-09047524**

In the Matter of:

VIVAR ISMAEL
Employer,

on behalf of:

MARIA CHAVEZ
Alien.

Appearance: Mary Elizabeth Orr, Esq.
for Employer and Alien

Certifying Officer: Rebecca Marsh Day
San Francisco, CA

Before: Burke, Vittone and Wood
Administrative Law Judges

DECISION AND ORDER

Per Curiam. This case arises from the employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212 (a)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is

to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

This decision is based on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On June 6, 1995, Ismael E. Vivar, ("Employer") filed an application for alien labor certification to enable Maria Chavez ("Alien") to fill the position of Domestic Cook - Peruvian Style. (AF 15). The Job duties for the position are:

> The occupant of this position will be required to cook, season and prepare a variety of Peruvian style dishes, including Arroz Con Pollo, Aji De Gallina, Ceviche, Escaveche, Carapulcra, fish, chicken, soups and salads, according to my recipes and instructions or drawn on the occupants own knowledge of cooking.

Id. Employer required two years of experience in the job offered or as a restaurant cook. *Id.*

On October 28, 1998, the CO issued a Notice of Findings ("NOF") proposing to deny certification on several grounds. (AF 9-13). The CO questioned whether permanent full-time employment was available to the Alien because full-time domestic cook positions are rare. (AF 10). The CO also found that the requirement of cooking Peruvian style dishes was restrictive, in violation of 20 C.F.R. § 656.21(b)(2)(i)(A); and that Employer rejected qualified U.S. workers, in violation of 20 C.F.R. § 656.24(b)(2)(ii). *Id.* Employer was directed to take the following corrective actions: (1) submit documentation indicating its ability to provide permanent, full-time employment; (2) amend the restrictive requirement or justify it based upon necessity; and (3) show with specificity the rejection of each U.S. worker. *Id.*

Employer's rebuttal, submitted through counsel, was dated December 1, 1998. (AF 5-7). Employer contended that the position offered is for a permanent, full-time position and indicated its willingness to amend the application by removing the restrictive requirement and retest the job market. Employer additionally cited a previous decision by the CO in an unrelated case to explain that two years of restaurant experience does not satisfy the experience requirement in the present case. Accordingly, it was Employer's position that the five U.S. applicants were unqualified. *Id.*

The CO issued a Final Determination ("FD") denying certification on June 7, 1999. (AF 3-4). The CO found that Employer failed to submit convincing documentation indicating its ability to provide permanent full-time employment and failed to explain the rejection of qualified U.S. workers. *Id.*

Employer has requested a review of the denial and the record has been submitted to the Board of Alien Labor Certification Appeals ("Board") for such purpose.

DISCUSSION

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Therefore, an applicant must take steps to ensure that it has lawful job-related reasons for rejecting U.S. applicants.

In general, an applicant is considered qualified for a job if he or she meets the minimum requirements specified for that job in the labor certification position. *See United Parcel Service*, 1990-INA-90 (Mar. 28, 1991); *Mancil-las International Ltd.*, 1988-INA-321 (Feb. 7, 1990); *Microbuilt Corp.*, 1987-INA-635 (Jan. 12, 1988). Further, an employer unlawfully rejects a U.S. worker who satisfies the minimum requirements specified on the ETA 750A and in the advertisement for the position. *See American Café*, 1990-INA-26 (Jan. 24, 1991); *Cal-Tex Management Services*, 1988-INA-492 (Sept. 19, 1990); *Richco Management*, 1988-INA-509 (Nov. 21, 1989); *Dharma Friendship Foundation*, 1988-INA-29 (Apr. 7, 1988).

In the present case, the minimum experience requirement stated in the application for the position was two years in the job offered or as a restaurant cook. (AF 15). Employer now seeks to reject U.S. applicants who met the express stated requirements of the position based upon a non-precedential authority. Rejecting applicants who meet the requirements listed in the application is clearly an unlawful reason for rejection. An employer unlawfully rejects a U.S. worker who satisfies the minimum requirements specified on the ETA 750A and in the advertisement for the position. *American Cafe*, 90-INA-26 (Jan. 24, 1991); *Cal-Tex Management Services*, 88-INA-492 (Sept. 19, 1990); *Richco Management*, 88-INA-509 (Nov. 21, 1989); *Dharma Friendship Foundation*, 88-INA-29 (Apr. 7, 1988).

Employer included no other rationale for rejecting the U.S. applicants. Because Employer has no basis to support its denial of five U.S. applicants and has failed to adequately document why each is unqualified for the position, we find that labor certification was properly denied. Accordingly, the following Order shall enter.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

SO ORDERED.

_____

TODD R. SMYTH
Secretary to the Board of
Alien Labor Certification Appeals

JMV/trs/ktn

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.